IN THE SUPREME COURT STATE OF MISSOURI

NRE:)) Suprama Count #5C02102
AMES P. BARTON, JR., Respondent.) Supreme Court #SC92102)
	RESPONDENT'S BRIEF

JAMES P. BARTON, JR. #34782 THE PROFESSIONAL BUILDING 905 SOUTH ODELL, SUITE A MARSHALL, MISSOURI 65340 (660) 886-4646 (PHONE) (660) 886-4644 (TELECOPIER) Bartonlaw1@gmail.com

RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF JURISDICTION	3
STATEMENT OF FACTS	4
BACKGROUND	4
Client Wrisner Client Rudd Additional Facts	8
POINT RELIED ON	10
ARGUMENT	11
CONCLUSION	17
CERTIFICATE OF SERVICE	18
CERTIFICATION: RULE 84.06(C)	18

TABLE OF AUTHORITIES

CASES	
In re Ehler, 319 S.W. 3d 442 (Mo. banc 2010)	16
OTHER AUTHORITIES	
ABA Standards for Imposing Lawyer Sanctions.	.12, 16, 17

STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article V, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law and Mo. Rev. Stat. §484.040 (1994).

STATEMENT OF FACTS

Background

Respondent James P. Barton, born in October of 1961, was licensed to practice law in Missouri in 1987. From 1987 until 2000, the Respondent practiced law in Kansas City with two different law firms. Both of those firms practiced primarily insurance defense litigation. In the Fall of 2000, the Respondent relocated his practice to Marshall, Missouri, his hometown. The Respondent's office continues to be located in Marshall, Missouri. The Respondent has no disciplinary history.

Client Linda Wrisner

In the summer of 2004, The Respondent agreed to represent Linda Wrisner Tomlin in a dissolution action filed against her by her then husband, James Tomlin, in Carroll County, Missouri. App. 104 (T. 10). Respondent told Ms. Tomlin he ordinarily charged \$1,500.00 retainer for the dissolution, but that given her situation and the fact that no other attorney would accept her case without the retainer being paid in advance, the Respondent would accept her case and the fees could be paid when the case was eventually resolved. App. 104 (T. 11). The fee agreement was not put into writing. Ms. Tomlin understood that Barton's entire fee would be \$1,500.00, and that he would wait to be paid until the court ordered Mr. Tomlin to pay her as part of the anticipated property distribution. App. 104 (T. 11-12), but this was not reduced to writing.

The dissolution trial occurred on December 20, 2005. Mr. Tomlin was ordered to pay Ms. Tomlin \$10,000.00. App. 162-166. On that same day, December 20, 2005, Mr. Tomlin paid \$2,500.00 to Mr. Barton on Ms. Tomlin's behalf. Mr. Barton disbursed \$1,000.00 to his

client and retained \$1,500.00 for payment toward his fee. Based on what Respondent allegedly told her when she hired him, Ms. Tomlin (now Ms. Wrisner) believed Mr. Barton's fee was fully paid on his retention of the \$1,500.00. App. 104 (T. 11), 105 (T. 14), but was advised that the remaining fees would be paid from monies to be received from her ex-husband.

The court's judgment of dissolution required Mr. Tomlin to pay Ms. Wrisner the remaining \$7,500.00 before January 31, 2006. App. 165. When Mr. Tomlin failed to comply with the judgment in that respect, Respondent Barton filed, on Ms. Wrisner's behalf, a motion to show cause and for judgment of contempt against Mr. Tomlin. At a November 9, 2006, hearing on the motion, Respondent Barton requested that Mr. Tomlin be ordered to pay an additional \$500.00 to Mr. Barton for his work in pursuing compliance with the dissolution decree. The Court ordered Mr. Tomlin to pay the additional \$500.00, which was paid to Respondent Barton. App. 125.

On November 9, 2006 (the date of the contempt hearing), Mr. Tomlin's attorney gave Respondent Barton two checks: one in the amount of \$2,000.00 and one in the amount of \$2,500.00. Respondent Barton deposited both checks in his client trust account. App. 114-115 (T. 52-53), 209.

On November 16, 2006, Respondent Barton distributed \$1,000.00 from the trust account to the Barton Law Firm, with the notation that the transaction was related to Ms. Wrisner's case. App. 115 (T. 53). A check in the amount of \$2,000.00 was written to Ms. Wrisner from the trust account on December 6, 2006. App. 115 (T. 53). The trust account balance fell below \$4,000.00 (the \$4,500.00 paid on Ms. Wrisner's behalf on November 9, 2006, less the \$500.00 additional fee ordered paid to Barton) between November 26 and 30, 2006. App. 115 (T. 54).

Mr. Tomlin thereafter, from December of 2006 through August of 2007, sent Mr. Barton checks (through Tomlin's attorney) in varying amounts (\$75.00 to \$100.00) as payments toward the dissolution judgment. None of these payments were deposited in the trust account, nor were the proceeds disbursed to Ms. Wrisner. The Respondent did advise the client that those monies had been paid.

Sometime after December of 2006, Respondent disbursed \$800.00 to Ms. Wrisner,1 although there is no trust account record of the transaction. App. 106 (T. 18), 115 (T. 54-55). Ms. Wrisner understood that her ex-husband was making payments to Respondent for the remaining sum that he owed her, and that Barton was holding the money for her. App. 105 (T. 16). The client had been advised that the balance of the attorney's fees due him would be paid from monies received from her ex-husband.

In the latter part of 2007, Mr. Tomlin sold a house and forwarded a final payment of \$6,470.00 to Respondent Barton. App. 120-121 (T. 76-77). Barton did not deposit any of the \$6,470.00 into his trust account. App. 115 (T. 55), 121 (T. 78). Indeed, from June through November of 2007, Respondent's client trust account reflected a negative balance. App. 115 (T. 55). The Respondent told Ms. Wrisner that her ex-husband had sold the house and that as part of the transaction, she would be paid the balance of her Judgment, from which her attorney's fees would be paid. App. 127 (T. 103-104).

The Respondent, having received the proceeds from the sale of the Tomlin house, prepared a billing statement for services rendered and his fees were taken from those proceeds.

Respondent Barton filed a satisfaction of judgment in Tomlin v. Tomlin on January 11, 2008. App. 151 and advised the client of the monies received from her ex-husband.

Ms. Wrisner asked Respondent Barton for the remainder of what she believed Mr. Barton was holding for her from the dissolution. App. 105 (T. 15). Finally, in June of 2008, Respondent provided Ms. Wrisner with a document titled "Final Statement." According to the statement, Respondent was holding no money for Ms. Wrisner, and, in fact, Ms. Wrisner owed Mr. Barton an additional \$335.00 for attorney's fees. App. 105-106 (T. 16-17). The statement reflected that Respondent had paid himself \$5,670.00 from money held for her for fees. App. 195-199. The statement reflected that Respondent had performed work for Ms. Wrisner on an hourly basis; Ms. Wrisner understood he was to be paid a lump sum of \$1,500.00 for his work. App. 104 (T. 11-12). Mr. Barton never talked to her about changing the fee arrangement or charging her by the hour. App. 104-105 (T. 12-13), 128 (T. 105), but was advised by the Respondent initially that she did not have to pay a \$1,500.00 retainer and that the Respondent would keep track of his time and bill her at an hourly rate when the case was completed and she received money from her ex-husband.

After receiving the final settlement statement, Ms. Wrisner filed a complaint against Mr. Barton with the Office of Chief Disciplinary Counsel. App. 3-4. After auditing Respondent's trust account, disciplinary counsel arranged to take Respondent's statement under oath. The day before the statement was to be taken at disciplinary counsel's office, Respondent faxed a letter to OCDC stating he had "resolved all of the pending issues" with Ms. Wrisner. Mr. Barton's letter states Ms. Wrisner had agreed to withdraw her complaint. App. 200. Ms. Wrisner recalls that at about the time of Respondent's letter to OCDC, Respondent gave her \$3,500.00 and asked her to sign a document titled "Full and Final Release Agreement." App. 201-202. Ms. Wrisner kept the \$3,500.00, but never signed the release and did not "withdraw" her complaint.

App. 106-107 (T. 20-21), 108 (T. 25-26). The client testified that she was the amount paid by the Respondent was negotiated and agreed upon, but that she did not sign the Release since it stated that the consideration was stated as "\$10.00 and other valuable consideration." She also testified that she would have signed the Release had it stated the consideration being paid as \$3,500.00.

Client Barry Rudd

In August of 1999, Barry Rudd was injured while attending a wedding in North Carolina. Mr. Rudd was a resident of Saline County, Missouri, at the time of the accident. In February of 2001, Respondent Barton agreed to represent Mr. Rudd in an effort to obtain compensation for the personal injury Rudd had sustained in North Carolina. App. 109 (T. 29-31).

On January 14, 2004, a petition alleging Mr. Rudd's personal injury was filed in North Carolina state court by a North Carolina attorney at Respondent Barton's request. On May 15, 2004, Mr. Rudd's North Carolina case was "discontinued" because proper service had not been obtained against the Defendant, Unique Southern Estates, LLC. App. 11, 27. In a letter dated March 28, 2006, Mr. Barton informed Mr. Rudd that service had never been made on the Defendant in the North Carolina case. The letter said nothing about the statute of limitations in the case or that the case had been filed but dismissed. App. 219.

On July 14, 2006, Respondent refiled Mr. Rudd's case in North Carolina state court as Mr. Rudd's attorney. Mr. Barton is not and never was licensed to practice law in North Carolina. The North Carolina Defendant subsequently filed a motion to dismiss alleging the statute of limitations had run on Mr. Rudd's cause of action. Mr. Barton filed suggestions opposing the

motion to dismiss. A North Carolina court sustained the motion to dismiss on October 18, 2006, on the grounds that the statute of limitations had run. App. 220-229.

Mr. Rudd learned that his North Carolina lawsuit had been dismissed by calling the court in North Carolina; Mr. Barton had not told him about it. App. 111 (T. 37-38), 122-123 (T. 84-85). Mr. Rudd subsequently sued Respondent Barton in North Carolina for malpractice and got a judgment for \$75,000.00, plus \$25,000.00 for punitive damages. App. 111 (T. 40). The judgment was thereafter registered in Saline County. Mr. Barton, who did not carry malpractice insurance covering Mr. Rudd's claim, has been paying Mr. Rudd pursuant to a written agreement negotiated and executed between the two. Respondent had paid Rudd about \$26,000.00 as of the time of the disciplinary hearing. App. 111-112 (T. 40-41). Mr. Barton testified at the hearing that he is not covered by malpractice insurance, though he had assumed there may be coverage thorough an insurance policy with his old firm in Kansas City. App. 48 (T. 103).

Additional Facts

When the Respondent moved back to Marshall in the Fall of 2000, he had accepted a part time position as the Assistant Prosecuting Attorney for Saline County, Missouri. While the position was part time, it required more than part time work. In addition to working as the Assistant Prosecutor for Saline County, the Respondent was also heavily involved in his Church and at times relevant to these two particular clients, he served as the Chairperson of the Board of the First Christian Church of Marshall and also taught a Sunday School class. The Respondent was also heavily involved in his community by serving 6 years on the Marshall School District Board of Education, serving as a board member for several community-based

entities, including a shelter for abused spouses and a local senior center. The Respondent also acted on a pro bono basis as counsel for several of these same not-for-profit entities. As noted above, the Respondent had previously worked as a litigation attorney in the Kansas City area for approximately 13 years.

POINT RELIED ON

THE SUPREME COURT SHOULD NOT SUSPEND RESPONDENT'S LICENSE WITHOUT LEAVE TO APPLY FOR REINSTATEMENT FOR TWO YEARS BECAUSE ALTHOUGH HE VIOLATED MULTIPLE RULES OF PROFESSIONAL CONDUCT, MOST SERIOUSLY THE SAFEKEEPING CLIENT PROPERTY RULE, IN THAT HE FAILED TO DEPOSIT CLIENT FUNDS IN HIS TRUST ACCOUNT, AND FAILED TO MAINTAIN COMPLETE RECORDS OF HIS HANDLING OF CLIENT MONEY. RATHER, THE SUPREME COURT SHOULD CONSIDER A LESSER PUNISHMENT, INCLUDING, BUT NOT LIMITED TO, A PROBATION PERIOD.

In re Ehler, 319 S.W. 3d 442 (Mo. banc 2010)

ABA Standards for Imposing Lawyer Sanctions

ARGUMENT

THE SUPREME COURT SHOULD NOT SUSPEND RESPONDENT'S LICENSE WITHOUT LEAVE TO APPLY FOR REINSTATEMENT FOR TWO YEARS BECAUSE ALTHOUGH HE VIOLATED MULTIPLE RULES OF PROFESSIONAL CONDUCT, MOST SERIOUSLY THE SAFEKEEPING CLIENT PROPERTY RULE, IN THAT HE FAILED TO DEPOSIT CLIENT FUNDS IN HIS TRUST ACCOUNT, AND FAILED TO MAINTAIN COMPLETE RECORDS OF HIS HANDLING OF CLIENT MONEY. RATHER, THE SUPREME COURT SHOULD CONSIDER A LESSER PUNISHMENT, INCLUDING, BUT NOT LIMITED TO, A PROBATION PERIOD.

Procedural Background

An information charging Respondent Barton with professional misconduct was served on December 3, 2010. The information charged Respondent with multiple rule violations in the course of representing two clients. Respondent timely answered the information, admitting each charged rule violation.

A hearing was conducted before a disciplinary hearing panel on May 23, 2011. Both of the affected former clients, Respondent, and an OCDC paralegal testified. In closing remarks, Informant recommended that the panel recommend an actual (not stayed) suspension, with no leave to apply for reinstatement for two years. Respondent argued against actual suspension, instead offering to undertake any remedial measures, e.g., CLEs or probationary terms, the panel thought appropriate.

The panel issued its decision on August 26, 2011. The panel recommended license suspension with no leave to apply for reinstatement for one year. Informant accepted the DHP's recommendation; Respondent rejected it. The record was thereafter filed with the Court pursuant to Rule 5.19 (d).

Rule Violations

Respondent Barton admitted all charged rule violations in his answer to the information. He did not deny his misconduct at the hearing and does not deny it here. This Brief will, therefore, discuss what would be an appropriate handling of this matter by this Court, given the circumstances of this case.

As noted in the Informant's Brief, the Standards model asks the following questions. (1) What ethical duty did the lawyer violate? (2) What was the lawyer's mental state? (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (4) Are there any aggravating or mitigating circumstances?

Here, the Respondent has admitted that he violated the ethical duties owed to both Ms. Wrisner and Mr. Rudd. However, there was no evidence then or now that he did so for malicious purposes. Rather, the evidence is clear that the violations with regard to the accounting in the Trust Account resulted from the fact that the Respondent had no prior experience with operating a Trust Account. As a result, the Respondent sought out education and guidance in that regard by attending a Continuing Legal Education Seminar on the proper handling of trust accounts. It should also be noted that the Respondent has no disciplinary history. During the first nearly 15 years of the Respondent's practice, the trust account was handled by other law firm staff.

It is also uncontroverted that the Respondent and both Ms. Wrisner and Mr. Rudd shared relationships outside of the Attorney Client relationship. After Ms. Wrisner filed her Complaint with the Missouri Bar, she began attending the First Christian Church of Marshall. This just happened to be the same church that the Respondent attended and still attends. In fact, Ms. Wrisner and the Respondent, Sunday after Sunday, sat within several rows of one another during the service. Over time, the distance between them at Church became closer until one day, after the Complaint was filed, there was a conversation about the dispute. After more than one conversation, Ms. Wrisner and Mr. Barton reached an agreement to resolve their disputes. Ms. Wrisner agreed to accept \$3,500 and Mr. Barton agreed to pay it. Being an old defense attorney, Mr. Barton prepared a Release Agreement and presented it to Ms. Wrisner with the settlement funds. Ms. Wrisner accepted the funds, but did not sign the Release because it did not specifically state that Mr. Barton was paying \$3,500.00 to resolve the dispute. Otherwise, the settlement and the Release were acceptable to her.

Given the relationship between Ms. Wrisner and Mr. Barton outside of the attorneyclient relationship, they were able to resolve their disputes.

Like Ms. Wrisner, the relationship between Mr. Rudd and Mr. Barton also widened beyond the attorney-client relationship. In fact, Mr. Rudd's daughter was at one time a Legal Secretary working with Mr. Barton and Mr. Rudd and Mr. Barton shared a friendship. While that friendship is a bit frayed today, it remains in tact. Like Ms. Wrisner, Mr. Barton's mishandling of Mr. Rudd's case in North Carolina was certainly not intentional. It was anything but. When Mr. Barton realized that the North Carolina case would be dismissed, he did

everything he could to try to salvage the case. Not just because he was Mr. Rudd's attorney, but also because he was Mr. Rudd's friend.

Again like Ms. Wrisner, with regard to Mr. Rudd the Respondent has made every effort to remedy his wrongdoings. In fact, there is a written agreement in effect between Mr. Rudd and Mr. Barton whereby Mr. Rudd is being reimbursed for his loss. Mr. Rudd made it clear that he was happy with the agreement and certainly held no feelings of ill will toward Mr. Barton. In fact, Mr. Rudd testified that given all of his other community activities at the time, Mr. Barton may have been a bit overwhelmed.

All of these facts are mitigating circumstances which the Court should consider in this matter, along with the fact that the Respondent had practiced law for more than 15 years without any disciplinary matters being brought against him. There are no aggravating circumstances here, other than the violations themselves.

The Respondent has not argued that he did not violate these Rules. As the Informant's Brief points out, the Respondent has been fully cooperative with this entire process and has shown true remorse. Out of the hundreds, if not thousands of cases which the Respondent has handled over the course of his more than 20 year legal career, the handling of these two cases is atypical of other cases. With Ms. Wrisner, she was in a position where she could not retain legal counsel with paying a retainer up front. As a result, Mr. Barton accepted the case and worked for a substantial period of time, with no guarantee that he would ever be paid. That fact did not detract at all from the representation actually provided. With Mr. Rudd, Mr. Barton agreed to help a friend and the matter was not resolved in a manner favorable to the friend.

As noted in the Informant's Brief:

The mitigating circumstances relevant to the case, it is suggested, are Mr. Barton's absence of a prior disciplinary record and his full and free disclosure and cooperative attitude toward the disciplinary proceeding. Mr. Barton has no prior disciplinary record in twenty-four years of practice. He has concededly been very cooperative with disciplinary authorities throughout the investigation and has freely acknowledged and admitted his wrongdoing.

At the disciplinary hearing, Respondent testified that he worked for an insurance defense firm in Kansas City for the first thirteen years of his career, then moved to his hometown of Marshall and set up a solo practice in conjunction with a position as part-time county prosecuting attorney. He testified that he was unfamiliar with firm accounting practices when he set out on his own. He testified that he spread himself too thin in the early years of his solo practice by volunteering to serve on local charitableboards, and that the part-time prosecutor's position was actually very time consuming.

While the Informant then goes on to suggest that these mitigating circumstances should not be considered by this Court, the Respondent respectfully disagrees. Perhaps more importantly, as the result of these same matters, the Respondent has taken proactive steps in his practice. As noted above, with regard to the accounting oversights, the Respondent has taken a Missouri Bar sponsored seminar which addressed the very same issues presented in the Information. In addition, the Respondent retired from his position as the Assistant Prosecuting Attorney for Saline County and has likewise retired from his positions with the First Christian Church, the Marshall Board of Education, the Lighthouse Shelter, and the Marshall Senior Center. The Respondent still does pro bono work for several of these and other community-

based entities, but not the same degree as in the past. All of these things were done in an effort to address and resolve the short fallings of the Respondent in the past.

Since the Fall of 2000, the Respondent has practiced in a small, rural community. As noted in the Disciplinary Hearing, a suspension of the Respondent's license to practice law, even for one year, is tantamount to a death penalty for the Respondent's practice.

In light of these facts, the Respondent respectfully suggests that the Court consider sanctions which fall short of a suspension. For example, the Respondent would certainly accept sanctions calling for additional CLE requirements as to trust accounts and related subjects. Similarly, the Respondent would accept a period of probation with whatever terms and conditions of probation this Court would see fit.

In the Informant's Brief, there is great reliance upon the Court's holding in *In re Ehler*, 319 S.W.3d 442 (Mo. Banc 2010). However, what distinguishes this case is that in that particular case, the Respondent had been found to have violated ethical rules and had been given a period of probation and supervision. It was during that same period of probation and supervision that the Respondent engaged in the same course of conduct which originally placed her on probation and supervision. Given those circumstances, the Court rightfully concluded that disbarment was appropriate.

In this case, the Informant has argued that Mr. Barton's situation is the same as Ms. Ehler's and that is not the case.

The ABA Standards contain "black letter rules" that aid in determining an appropriate sanction. The black letter rules are set up by reference to the duty violated. In this case, the duty to preserve clients' property has been violated, which is conduct encompassed by black letter

Rule 4.1. Rule 4.12 provides that suspension is generally appropriate, but only when a lawyer

knows or should know that he is dealing improperly with client property and causes injury or

potential injury to the client. However, this does not stand for the proposition that the

reviewing entity cannot consider all of the facts of the case presented to it. There are mitigating

factors, which are stated above, which this Court should take into account in deciding this

matter. While suspension may be generally appropriate, the Respondent respectfully suggests

that there are other remedies which this Court has at its disposal.

CONCLUSION

A long-term suspension is not an appropriate sanction in this matter. The Court should consider all of the facts of this case, as noted above, and should also consider alternatives other than suspension.

Respectfully submitted,

/s/ James P. Barton, Jr.

James P. Barton, Jr. #34782

The Professional Building

905 South Odell, Suite A

Marshall, Missouri 65340

(660) 886-4646 (PHONE)

(660) 886-4644 (TELECOPIER)

Bartonlaw1@gmail.com

RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2012, two copies of Respondent's Brief in a PDF format was sent via email to:

Sharon Weedin 3335 American Avenue Jefferson City, Missouri 65109 Attorney for Informant Sharon.Weedin@courts.mo.gov

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

- 1. Includes the information required by Rule 55.03;
- 2. Complies with the limitations contained in Rule 84.06(b);
- 3. Contains 4,086 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
- 4. That Trend Micro Anti-Virus software was used to scan the disk for viruses and that it is virus free.

/s/ James P. Barton, Jr.
James P. Barton, Jr.